(10)

No. 87-645

In the Supreme Court of the United States

OCTOBER TERM, 1987

F. CLARK HUFFMAN, ET AL., PETITIONERS

v.

WESTERN NUCLEAR, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI
FILED OCTOBER 18, 1987
CERTIORARI GRANTED JANUARY 11, 1988

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• The order of the district court and the opinion of the court of appeals are printed in the appendix to the petition and have not been reproduced.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

WESTERN NUCLEAR, INC., ET AL.

v.

F. CLARK HUFFMAN, ET AL., 84-C-2315

Date	Proceedings
12.07.84	Complaint filed
04.11.85	Answer filed, attached declarations of John R. Longenecker, Sherry E. Peske
07.10.85	Plaintiffs' motion for summary judgment on Counts I and V, with memorandum in support and attachments filed
07.25.85	State of Wyoming motion for leave to file amicus brief filed and amicus brief tendered
09.06.85	Minute order conditionally granting Wyoming motion to file entered
10.01.85	Defendants' motion for judgment on the pleadings, supporting memorandum with attachments, filed
10.28.85	Plaintiffs' response to motion for judgment on the pleadings or for summary judgment as to Count III filed
11.07.85	Uranium Producers' motion for leave to file amicus memorandum on Count I filed and amicus memorandum tendered

Date	Proceedings
11.21.85	Amicus brief of Wyoming filed; Uranium Producers' motion for leave to file amicus brief granted
11.26.85	Utilities' motion to file memorandum of law as amici filed; affidavit of Loring E. Mills filed; Defendants' reply memorandum as to Count III filed
01.21.86	Defendants' supplemental memorandum filed
01.29.86	Plaintiffs' memorandum in response to defendants' supplemental memorandum filed
02.14.86	Defendants' motion to stay proceedings pending rulemaking and memorandum in support filed
02.25.86	Plaintiffs' opposition to motion to stay proceedings pending rulemaking and supporting memorandum filed
06.05.86	Hearing held; Hearing Order entered
06.06.86	Defendants' opposition to entry of plaintiffs' proposed Order on Count I filed
06.16.86	Amicus Domestic Utilities' joiner of amici in opposition to proposed Order filed; Defendants' supplemental opposition to entry of plaintiffs' proposed injunctive Order on Count I filed
06.20.86	Order of the district court [reproduced in Appendix to Petition] entered
06.24.86	Defendants' motion for stay pending appeal and memorandum in support filed; Notice of Appeal filed

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 86-1942

F. CLARK HUFFMAN, ET AL., DEFENDANTS/APPELLANTS

v.

WESTERN NUCLEAR, INC., ET AL., PLAINTIFFS/APPELLEES

Date	Proceedings
06.25.86	Appeal docketed
07.11.86	Appellants' motion for stay pending appeal filed
07.18.86	Appellees' response to stay motion filed
07.21.86	Appellants' application for stay of district court's injunction and motion to consolidate with No. 85-2428 [appeal of district court order on Count V of complaint] granted
08.20.86	Order entered granting amicus applications; amicus briefs filed
09.03.86	Additional amicus brief filed
09.11.86	Argued and submitted
07.20.87	Opinion filed—affirmed in part (as to Count I), reversed in part (as to Count V) and remanded; previously entered stay dissolved
07.23.87	Appellants' motion to stay judgment, stay order dissolving previous stay and stay mandate pending petition for certiorari filed
07.30.87	Appellees' response to stay motion filed
07.31.87	Appellants' reply to appellees' response filed

Date	Filings – Proceedings
10.08.87	Appellants' motion to stay issuance of mandate pending disposition of petition for writ of certiorari granted
12.02.87	Received notice of filing of petition for certiorari on 11.18.87
01.15.88	Received Supreme Court Order granting certiorari, dated 01.11.88
02.12.88	Record on certiorari along with district court record on appeal sent to Supreme Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 84-2315

WESTERN NUCLEAR, INC.; ENERGY FUELS NUCLEAR, INC.; AND URANIUM RESOURCES INC., PLAINTIFFS,

VS.

F. CLARK HUFFMAN, AS CHIEF, ENRICHMENT SERVICES BRANCH, ENRICHING OPERATIONS DIVISION, DEPARTMENT OF ENERGY;

SHERRY E. PESKE, AS ACTING DIRECTOR OF MARKETING AND BUSINESS OPERATIONS (URANIUM ENRICHMENT) OF THE DEPARTMENT OF ENERGY;

JOHN R. LONGENECKER, AS DEPUTY ASSISTANT SECRETARY FOR URANIUM ENRICHMENT OF THE DEPARTMENT OF ENERGY;

WILLIAM R. VOIGT, AS SPECIAL ASSISTANT FOR STRATEGIC POLICY ASSESSMENT TO THE ASSISTANT SECRETARY FOR NUCLEAR ENERGY OF THE DEPARTMENT OF ENERGY;

JAMES W. VAUGHN, AS ASSISTANT SECRETARY FOR NUCLEAR ENERGY OF THE DEPARTMENT OF ENERGY;

EARL GJELDE, AS SPECIAL ASSISTANT TO THE SECRETARY OF THE DEPARTMENT OF ENERGY;

DANIEL BOGGS, AS UNDER SECRETARY OF THE DEPARTMENT OF ENERGY;

DONALD P. HODEL, AS SECRETARY OF THE DEPARTMENT OF ENERGY; AND

UNITED STATES DEPARTMENT OF ENERGY, DEFENDANTS.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs Western Nuclear, Inc.; Energy Fuels Nuclear, Inc.; and Uranium Resources, Inc. (hereinafter referred to collectively as "Plaintiffs") for their Complaint against Defendants allege:

A. JURISDICTION AND VENUE

1. Subject matter jurisdiction is based on 28 U.S.C. Sections 1331 and 1337. The matters in issue arise out of laws and regulations of the United States, and federal agency actions affecting interstate and foreign commerce. Venue is proper under 28 U.S.C. Section 1391(e) because, among other things, at least one of the plaintiffs resides in the State of Colorado within the District of Colorado.

B. PARTIES

1. Western Nuclear, Inc. (Western), a plaintiff herein, is a Delaware corporation, with its principal place of business and headquarters at 134 Union Boulevard, Lakewood, Colorado 80228. Western owns uranium mills and mines in the states of Washington and Wyoming. Western also owns a uranium mine in the state of New Mexico and is a part-owner of a mine under development in Texas. As an owner of uranium mines and mills, Western is a participant in the domestic uranium industry and is directly or indirectly affected by the actions of the Defendants described below.

2. Energy Fuels Nuclear, Inc. (Energy Fuels), a plaintiff herein, is a Colorado corporation with its principal place of business and headquarters at Suite 900, 3 Park Central, 1515 Arapahoe Street, Denver, Colorado 80202. Energy Fuels owns uranium mines in the states of Utah, Arizona, and Wyoming and is part owner of a uranium

mill in Utah. As an owner of uranium mines and a mill, Energy Fuels is a participant in the domestic uranium industry and is directly or indirectly affected by the actions of the Defendants described below.

3. Uranium Resources, Inc. (Uranium Resources), a plaintiff herein, is a Delaware corporation with its principal place of business and headquarters at Suite 735, Promenade Bank Tower, Richardson, Texas 75080. Uranium Resources owns an in situ uranium mine in Texas. As an owner of a uranium mine, Uranium Resources is a participant in the domestic uranium industry and is directly or indirectly affected by the actions of the Defendants described below.

4. Defendant F. Clark Huffman is Chief, Enrichment Services Branch, Enriching Operations Division, Department of Energy, is sued in his official capacity, and resides for purposes of this proceeding in Oak Ridge, Tennessee.

5. Defendant Sherry E. Peske is Acting Director of Marketing and Business Operations (Uranium Enrichment) of the Department of Energy, is sued in her official capacity, and resides for purposes of this proceeding in Washington, D.C.

6. Defendant John R. Longenecker is Deputy Assistant Secretary for Uranium Enrichment of the Department of Energy, is sued in his official capacity, and resides for purposes of this proceeding in Washington, D.C.

7. Defendant William R. Voigt is Special Assistant for Strategic Policy Assessment to the Assistant Secretary of Nuclear Energy of the Department of Energy, and formerly Acting Director of the Office of Uranium Enrichment and Assessment of the Department of Energy, is sued in his official capacity, and resides for purposes of this proceeding in Washington, D.C.

8. Defendant James W. Vaughn is the Assistant Secretary for Nuclear Energy of the Department of Energy, is sued in his official capacity, and resides for purposes of this proceeding in Washington, D.C.

9. Defendant Earl Gjelde is Special Assistant to the Secretary of the Department of Energy, is sued in his official capacity, and resides for purposes of this proceeding in Washington, D.C.

10. Defendant Daniel Boggs is Under Secretary of the Department of Energy, is sued in his official capacity, and resides for purposes of this proceeding in Washington, D.C.

11. Defendant Donald P. Hodel is the Secretary of the Department of Energy, is sued in his official capacity, and resides for purposes of this proceeding in Washington, D.C.

12. Defendant United States Department of Energy is a department in the Executive Branch of the Government of the United States and resides for purposes of this proceeding in Washington, D.C. at 1000 Independence Avenue, S.W.

C. OVERVIEW

This is a Complaint in five counts for declaratory and injunctive relief against the United States Department of Energy and certain of its officials (collectively referred to herein as "DOE"). The five Counts are summarized below.

1. (a). Under section 161(v) of the Atomic Energy Act, 42 U.S.C. Section 2201(v), enacted in 1964, DOE is obligated to limit the enrichment of foreign uranium for domestic end uses so as to "assure the maintenance of a viable domestic uranium industry". Section 161(v) was originally implemented by barring enrichment of foreign-

source uranium for domestic end-use. Limitations upon enrichment of foreign uranium have now been phased out.

(b). Subsequent to the decison to phase out these limitations, the domestic uranium industry has collapsed: many companies have or are exiting the industry; many mines or mills have either closed or severely curtailed operations; thousands of uranium miners and other workers have lost their jobs; and the price of uranium, in real terms, is less than at any time since the adoption of the statute. During the same period, commitment for importation of foreign uranium have escalated to nearly half domestic demand.

(c). Plaintiffs have repeatedly requested DOE to take action to assure the maintenance of a viable domestic uranium industry as required by section 161(v). DOE has unlawfully failed to implement section 161(v). This Court should declare the meaning of the term "viable" as employed in section 161(v); should order DOE to initiate proceedings leading to the adoption of appropriate limits on enrichment of foreign source uranium for domestic end-use; and should require DOE to impose appropriate interim limitations on such enrichment pending the outcome of such proceedings.

2. 42 U.S.C. Section 7191 requires DOE to comply with notice-and-comment rulemaking requirements described in 5 U.S.C. Section 553, including those requirements with respect to public property and contracts. DOE, on January 18, 1984, issued a new standard form enrichment contract, termed the "Utility Services" or "US" contract without compliance with 5 U.S.C. Section 553 and 42 U.S.C. Section 7191. Similarly, DOE unlawfully failed to submit the new enrichment contract in proposed form to pertinent committees of Congress for 45 days prior to its issuance, as required by 42 U.S.C. Sections

2201(v) and 2258. The new enrichment contract should accordingly be invalidated.

3. The standard form enrichment contract requires DOE customers to purchase a fixed amount of enrichment service for each unit of uranium furnished DOE. This "fixed tails" policy limits demand for domestic uranium, which is detrimental to the maintenance of a viable domestic uranium industry, is unlawful, and contravenes 42 U.S.C. sections 2201(v) and 2201(m). DOE should be barred from any continued enforcement or implementation of the fixed tails assay policy.

4. DOE sells enriched uranium of foreign origin from the federal government stockpile for domestic end-use pursuant to the policies known as the "split tails" and "pre-produced inventory" policies. These policies inhibit and prevent the development of sources of supply independent of the Department of Energy in violation of 42 U.S.C. Sections 2093 and 2201(m). DOE should be precluded from any further sales of uranium under the split tails and pre-produced inventory policies.

5. Under 42 U.S.C. Section 2210b, DOE is required to adopt regulations defining a viable domestic uranium industry for, among other reasons, requesting relief under section 262 of the Trade Expansion Act of 1962, 19 U.S.C. Section 1862, and section 201 of the Trade Act of 1974, 19 U.S.C. Section 2251. The regulations adopted (48 Fed. Rg. 45746 (Oct. 6, 1983)) did not comply with the statute and were issued in a manner contrary to 5 U.S.C. Section 553.

D. COUNT I

(failure to implement section 161(v))

1. The Plaintiffs hearby incorporate all the foregoing allegations.

2. Commencing in 1948, the Atomic Energy Commission ("AEC") sponsored and administered an extensive

program to foster the development of a domestic uranium industry in the United States and to attain domestic self-sufficiency. Pursuant to this program, the AEC, which was the sole purchaser of domestic-origin uranium until the 1960's, guaranteed the purchase price of uranium, assisted in the location and construction of uranium mills, and otherwise encouraged the development of a viable domestic uranium industry. By 1963, domestic self-sufficiency had been attained. The AEC also purchased large quantities of foreign-source uranium during this period, principally from South Africa and Canada.

3. In 1964 Congress passed the Private Ownership of Special Nuclear Materials Act (P.L. 88-489). This Act provided, among other things, for toll-paid enrichment services by the AEC for privately-owned uranium. Congress was concerned that during times of limited demand for uranium, the private market for the material would not be sufficient to assure the maintenance of a viable domestic uranium industry and, moreover, that from time to time the domestic industry would be subjected to "ruinous competition" from cheap foreign uranium. Congress viewed a viable domestic uranium industry as an important segment of the economy and as essential for the national security. Congress accordingly directed, that:

> "the [Atomic Energy] Commission, to the extent necessary to assure the maintenance of a viable domestic uranium industry, shall not offer such services for source[1] or special nuclear[2] materials of for-

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[1] "Source material" is defined in the Atomic Energy Act to mean "(1) uranium, thorium or any other material which is determined by the Commission pursuant to the provisions of [42 U.S.C. Section 2091] to be source material or (2) ores containing one or more of the foregoing materials, in such concentration as the Commission may, by regulation, determine from time to time." 42 U.S.C. Section 2014(z).

[2] "Special nuclear material" is defined in the Atomic Energy Act to mean "(1) plutonium, uranium enriched in the isotope 233 or in the

eign origin intended for use in a utilization facility [nuclear reactor] within or under the jurisdiction of the United States."

4. Acting pursuant to this provision, the AEC adopted criteria barring the enrichment of foreign-source uranium for domestic end-use. 31 Fed. Reg. 16479 (1966). In the early 1970's, the AEC projected a rapid expansion in the size of the civilian nuclear industry and a concomitant increase in demand for uranium. Under these circumstances, the AEC concluded that enrichment restrictions could be phased out without adverse impact on the domestic uranium industry. In 1974, the AEC adopted revised enrichment criteria phasing out restrictions on enrichment of foreign source uranium for domestic end-use by January 1, 1984. 39 Fed. Reg. 38016 (1974).

5. The projected increase in demand did not materialize. Subsequent to the relaxation of restrictions, imports of foreign-source uranium have ballooned and will continue to increase. Prices for uranium have dropped in real terms to levels less than those prevailing in 1966-67 when import restrictions were originally adopted. Costs, however, have escalated. Commitments to purchase domestic origin uranium have actually decreased. Exploration for domestic uranium reserves has come to a standstill and is at its lowest point since the inception of the domestic uranium industry after World War II. At least sixteen uranium mills have closed and the remaining 8 have curtailed production. Hundreds of mine projects have been terminated or suspended. Domestic uranium industry employment is currently less than one-fifth of the level which existed in 1980. Thousands of uranium miners are unemployed. Officials of the DOE charged with surveying the domestic uranium industry in fact concluded in 1982 that the industry could not be regarded as viable.

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isotope 235, and any other material which the Commission, pursuant to the provisions of [42 U.S.C. Section 2071], determines to be special nuclear material . . . ; or (2) any material artifically enriched in any of the foregoing, but does not include source material." 42 U.S.C. Section 2014(aa).

6. The domestic uranium industry is not "viable" for purposes of section 161(v) of the Atomic Energy Act.

7. Even if the domestic uranium industry were somehow viewed as viable, there is no assurance under these circumstances of continued viability within the meaning of section 161(v).

8. Imports of foreign-source uranium for domestic end use significantly contribute to the current non-viable condition of the nation's domestic uranium industry.

9. Under DOE estimates in 1981, imports were projected to account for approximately 9 percent of domestic demand for the next ten-year period. This was revised in 1983 to 30 percent. Experts now project that uranium imports will exceed seventy percent (70%) of domestic demand within a few years. These imports displace demand for domestic uranium, increase unit costs for remaining producers, force existing domestic facilities to shut down or curtail operations, cause unemployment, forestall the development of new uranium mines and mills necessary to supply future demand, and otherwise render the domestic uranium industry non-viable now and in the future.

10. Once domestic uranium mines and mills are shut down, federal and many state laws require initiation of decommissioning and reclamation activities. Enormous new capital investments and lengthy and costly regulatory delays must be incurred to open new facilities. In addition, a new labor force must be assembled and trained. As much as ten years are required for these tasks. Section 161(v) of the Atomic Energy Act was intended to avoid such an occurrence.

11. Since at least 1981, Plaintiffs have repeatedly requested that DOE implement section 161(v) of the Atomic Energy Act by reimposing limitations on the enrichment of foreign source uranium for domestic end use. DOE has arbitrarily and unlawfully failed to act in response to these requests. See Exhibits A-E.

12. In addition, Plaintiffs have repeatedly requested DOE to determine the viability status of the domestic uranium industry and have objected to DOE's erroneous working definition of viability. For example: By letter dated 18 June 1981, Western indicated that "viable domestic uranium industry" means an industry "capable of living, growing and developing in a favorable environment," that the domestic uranium industry is not viable, and that imports are a significant threat to the maintenance of the domestic uranium industry and a significant cause for its non-viable condition. By letter dated 23 December 1981, DOE unlawfully and arbitrarily defined a "viable" domestic uranium industry in essence as whatever industry, if any, remains regardless of unlimited importation of foreign-source uranium.

13. DOE's definition of viability for purposes of section 161(v) of the Atomic Energy Act is unlawful, arbitrary and capricious; renders section 161(v) nugatory; and contravenes the Atomic Energy Act.

14. DOE has failed to perform a clear, specific non-discretionary duty to limit enrichment of foreign source uranium for domestic end use so as to maintain the viability of the domestic uranium industry.

15. DOE's failure to take action to assure the maintenance of a viable domestic uranium industry is unlawful, arbitrary and capricious and renders section 161(v) nugatory.

16. DOE also has a duty to request the Nuclear Regulatory Commission (NRC) to implement restrictions

on the importation of enriched uranium pursuant to sections 53 and 69 of the Atomic Energy Act, 42 U.S.C. Section 2023 and 2099, and to take other measures necessary to assure the maintenance of a viable domestic uranium industry.

* * * * *

K. PRAYER FOR RELIEF

WHEREFORE plaintiffs Western Nuclear, Inc.; Energy Fuels Nuclear, Inc.; and Uranium Resources Inc. request that the Court grant the following relief:

(a) A Declaration determining the meaning of "viable domestic uranium industry" for purposes of section 161(v) of the Atomic Energy Act, 42 U.S.C. Section 2201(v);

(b) A Declaration (i) invalidating all previous determinations by DOE that the domestic uranium industry is "viable" for purposes of section 161(v) and (ii) determining that there is currently no assurance of the maintenance of a viable domestic uranium industry for purposes of section 161(v);

(c) An Order setting a schedule requiring DOE within 60 days to propose and within 180 days to adopt criteria relating to enrichment of foreign-source uranium for domestic end use sufficient to assure the maintenance of a viable domestic uranium industry, and to make such other orders as it deems proper, including but not limited to, requiring DOE to request NRC, within a compatible time frame, to impose license conditions restricting importation of source material and special nuclear material pursuant to sections 53 and 69 of the Atomic Energy Act; 42 U.S.C. Sections 2073 and 2099;

(d) An Order prohibiting DOE from enriching foreign uranium for domestic end use, pending adoption of limita-

tions upon the enrichment of foreign uranium sufficient to assure the maintenance of a viable domestic uranium industry;

(e) A Declaration that the new US enrichment contract issued January 18, 1984, is null and void;

(f) An Order barring DOE from adopting a generic enrichment contract without compliance with the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, and 42 U.S.C. 2201(v).

(g) An Order barring DOE from restricting the demand for domestic uranium by the utilization of any provision in current or future enrichment contracts implementing the fixed tails assay policy or any variant of that policy;

(h) An Order prohibiting direct or indirect sales of uranium from the U.S. government's uranium stockpile including any future sales pursuant to the split-tails or preproduced inventory policies, in a manner consistent with DOE's duty to maintain a viable domestic uranium industry;

(i) A Declaration that the regulations published by DOE at 48 Fed. Reg. 45746 (October 6, 1983) are invalid and unlawful;

(j) Such other and further relief as the Court deems just and proper, including costs and reasonable attorney fees.

Respectfully submitted this 7th day of December, 1984.

SHAVER & LICHT

/s/ Harley W. Shaver

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Department of Energy
Washington, D.C. 20545

Dec. 28, 1981

Mr. Donald O. Rausch
President
Western Nuclear, Inc.
134 Union Boulevard
Lakewood, Colorado 80228

Dear Mr. Rausch:

Regarding your letter to me of November 12, 1981, my staff and I were happy to meet with you and with representatives from Homestake, Kerr-McGee, and Rocky Mountain Energy on October 27, 1981, to discuss the domestic uranium producing industry. I appreciated receiving your views and those of the other uranium producers. However, I am very concerned that you perceive that we at the Department of Energy (DOE) would disregard our obligations under Section 161v of the Atomic Energy Act. I cannot understand how you could have arrived at such an erroneous perception. Let me assure you that we take all of our obligations under the Act with the utmost seriousness. Furthermore, I have no recollection of saying that if we found the mining industry was not viable that we would not take steps to alleviate the situation. My staff at the meeting took fairly complete notes and there is no indication in their notes that I said anything like that.

Regarding the lay-off of 600 Western Nuclear employees, we understand this resulted from your decision to purchase uranium from the excess inventory of a reactor manufacturer to fill your sales contracts, rather than to

produce the uranium from your mine and mill. This decision did not relate to impacts of imported uraniums, but from the excess inventories in a buyer's hands and a producer's willingness to buy from inventory rather than produce.

We share your concerns about the health of the U.S. uranium producing industry. However, we continue to believe that the industry has overbuilt capacity and must reduce production to be in better balance with demand. We know this will be a painful adjustment for some companies. But the adjustment must be made primarily because of nuclear power construction delays, cancellations, and lack of new reactor orders. After the adjustments are completed we believe the domestic uranium producing industry will continue to be viable. As you said during our meeting on October 27, this may result in fewer companies, and perhaps mainly the major oil producers, remaining as uranium producers. Nonetheless, the companies that remain as domestic uranium producers will comprise a viable industry and others can re-enter the industry as markets grow.

Regarding the Westinghouse Electric Corporation's settlement of its suits against uranium producers, based on information we have assembled, Westinghouse will receive 9 million pounds of foreign-origin U_3O_8 over the next 5 years. We understand that this foreign-origin uranium will be used over at least a 10-year period which will represent less than 2 percent of domestic requirements over those years.

The other possible source of foreign-origin uranium that resulted from the Westinghouse settlement is through Gulf Oil Corporation which assumed responsibility for delivery of 13 million pounds of U_3O_8 to be supplied over a period extending beyond the end of the century. It is uncertain at

this time how much of this uranium will come from Gulf's Mount Taylor mine in New Mexico and how much will come from Gulf's Canadian subsidiary, Gulf Minerals Canada, Ltd. Canadian Government approval will be required for export from Canada. If Canadian-origin uranium is used, it will be a domestic uranium producer who will decide to bring the foreign uranium into the country. Since Section 161v of the Atomic Energy Act was intended to assure the maintenance of a viable domestic uranium producing industry, it would seem incongruous to change import restrictions to limit the amount of foreign uranium used because of the potential use of foreign uranium by a domestic uranium producer.

Regarding your recommendation to Senator Domenici on "enrichment transactions—variable tails," a holder of DOE's Adjustable Fixed-Commitment (AFC) contract currently has considerable flexibility within the contract to select his own tails assay. The Variable Tails Assay Option (VTAC) contained in the AFC contract permits the contract holder, with 15 months notice before the beginning of a government fiscal year, to select the tails assay he wants to transact at during that fiscal year. For example, AFC contract holders have given us notice for the tails assay they want for FY 1983, which will begin on October 1, 1982. Twenty-three domestic utilities with AFC contracts could have used the VTAO in FY 1983. Of those 23 utilities, 12 have elected to use the VTAO and have selected tails assays from 0.16 percent U-235 to 0.30 percent U-235, with a weighted average of 0.220 percent U-235. In addition, the AFC contract permits an enrichment contract holder to vary his enrichment services by ±10 percent in the fourth year of the contract and ±20 percent in the fifth year of the contract. Currently, the fourth year in the contract is FY 1986 and the fifth year is

FY 1987. By using this flexibility plus the VTAO, a contract holder will be able to meet his enriched uranium needs with a tails assay as great as 0.30 percent U-235. However, we will continue to examine our AFC contract to see if greater flexibility can be included in the contract, while assuring that we are able to provide enrichment services on a sound basis. We will also examine carefully, as part of planning the operation of the DOE uranium enrichment plants, whether the transaction tails assay can be increased for all of our contract holders. Those utilities who hold our Requirements-type contract do not have the flexibilities that are contained in the AFC contract. However, the Requirements-type contract holder can switch to the AFC contract with no charge at any time.

Finally, regarding your recommendation to Senator Domenici on "enrichment transactions—uranium stockpile," I hope the comments provided by Dr. Shelby Brewer to you in his letter of November 27, 1981, clarifies the apparent misunderstanding on the "sale" of DOE-owned uranium. As Dr. Brewer explained, DOE is not in any way "selling" any of its uranium. Rather, it is merely accounting for material previously used in producing an inventory of enriched uranium.

Sincerely,

/s/ William R. Voigt, Jr.

WILLIAM R. VOIGT, JR.
Acting Director
Office of Uranium Enrichment
and Assessment
Nuclear Energy

cc:
Senator Pete V. Domenici

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 84-C-2315

WESTERN NUCLEAR, INC., ET. AL., PLAINTIFFS

v.

F. CLARK HUFFMAN, ET. AL., DEFENDANTS

ANSWER

Defendants respond as follows to the allegations of the complaint herein:

FIRST DEFENSE

The court lacks jurisdiction of the subject matter of this action.

SECOND DEFENSE

The complaint fails to state a claim upon which relief may be granted.

THIRD DEFENSE

Plaintiffs lack standing to bring this action.

FOURTH DEFENSE

Answering specifically the allegations of the complaint, defendants respond as follows to the particular paragraphs thereof:

1. Paragraph A-1 is a statement of jurisdiction and venue as to which no answer is required. To the extent an answer may be required, denied.

2. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of ¶s B-1 through B-3.

3. As to ¶s B-4 through B-12, they constitute statements as to the identities of the defendants as to which no answer is required.

4. As to ¶s C-1 through C-5, the allegations constitute plaintiffs' characterizations of the matters at issue and conclusions of law, and no response is required. Further, insofar as the allegations of these paragraphs constitute the plaintiffs' summaries of their claims, the Court is respectfully referred to the defendants' responses to the particular allegations of the Court of the complaint which are set forth hereafter in this answer.

5. As to ¶ D-1, all of defendants' preceding responses are realleged and incorporated herein as though fully set forth.

6. As to ¶ D-2, admit.

7. As to ¶ D-3, defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations thereof, except to admit Congress' passage of P.L. 88-489 in 1964.

8. As to ¶ D-4, admit.

9. As to ¶ D-5, defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations thereof; except to deny that officials of the Department of Energy charged with surveying the domestic uranium market concluded in 1982 that the industry could not be regarded as viable.

10. As to ¶ D-6 through D-8, the allegations consist of conclusions of law as to which no answer is required. To the extent an answer may be required, denied.

11. As to ¶ D-9. admit the first two sentences. As to the third sentence, defendants are without knowledge or

information sufficient to form a belief as to the truth of the allegations thereof. The fourth sentence consists of conclusions of law as to which an answer is not required. To the extent an answer may be required, denied.

12. As to ¶ D-10, defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations thereof, except as to the last sentence thereof which consists of conclusions of law as to which an answer is not required. To the extent an answer may be required, denied.

13. As to ¶ D-11, the allegations are denied except to admit the allegations of the first sentence.

14. As to ¶ D-12, the allegations are denied, except to admit the exchange of correspondence between plaintiff Western and the Department of Energy on June 18, 1981 and December 23, 1981.

15. As to ¶ D-13, the allegations are denied.

16. As to ¶ D-14, the allegations constitute conclusions of law as to which an answer is not required. To the extent an answer may be required, denied.

17. As to ¶s D-15 and D-16, the allegations are denied.

* * * * *

For further answer, defendants deny all allegations of the complaint not heretofore Admitted or Denied.

Finally, defendants deny that plaintiffs are entitled to any of the relief they seek or to relief in any other form.

WHEREFORE, defendants request that the complaint herein be in all respects dismissed with prejudice; that defendants recover costs; and, that defendants be granted such other and further relief to which they are entitled.

Respectfully submitted,

RICHARD K. WILLARD
Acting Assistant Attorney General

ROBERT N. MILLER
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 84-C-2315

WESTERN NUCLEAR, INC., ET. AL., PLAINTIFFS,

v.

F. CLARK HUFFMAN, ET. AL., DEFENDANTS.

MEMORANDUM IN SUPPORT OF MOTIONS FOR SUMMARY JUDGMENT ON COUNTS I AND V

I. Introduction

Under Section 161(v) of the Atomic Energy Act, the Department of Energy (DOE) is required to regulate the nation's uranium enrichment program so as "to assure the maintenance of a viable domestic uranium industry." The same statute requires the DOE to establish criteria setting forth, *inter alia*, "the extent to which [enrichment] services will be made available for [uranium] of foreign origin intended for use in" the United States. 42 U.S.C. § 2201(v)(B) (1982).

Section 170B of the Atomic Energy Act, 42 U.S.C.A. § 2210b (West Supp. 1986), also relates to DOE's responsibilities respecting the viability of the domestic uranium industry. This Section requires the DOE to monitor and, for the years 1983 to 1992, to report annually on the viability of the domestic mining and milling industry. For that purpose, Section 170B requires the DOE to establish by rule, after public notice and opportunity for comment, specific criteria by which viability shall be assessed. Section 170B explicitly enumerates eight factors which must be included in the DOE's assessment of viability.

The DOE has failed to adhere to its obligations under each of these statutory sections. As Count I of the complaint alleges, the domestic uranium industry is in its most depressed condition since its inception. It is clearly nonviable for purposes of Section 161(v) of the Atomic Energy Act. Yet DOE, which has a duty to limit enrichment of foreign source uranium for domestic end use to the extent necessary to assure the maintenance of a viable domestic uranium industry, has failed to take any such action, despite repeated requests. In the light of the present condition of the industry, the DOE must be required to initiate a proceeding under a prescribed time schedule to impose appropriate limitations on enrichment of foreign source uranium for domestic consumption.

Count V of the complaint alleges that the criteria that DOE has promulgated by which viability of the domestic uranium mining and milling industry is to be measured are fatally flawed for two reasons. Procedurally, these criteria should be set aside because they were not developed, as the statute requires, in accordance with the Administrative Procedure Act and with the requirements of 42 U.S.C. § 7191 (1982). Substantively, the criteria should be set aside because the DOE has adopted criteria for measuring viability that are patently at odds with the language of the statute.

No genuine issues of material fact are presented by either of these claims. With respect to Count I, there is no question but that the DOE makes no effort at all to restrict its enrichment of foreign uranium destined for domestic use. There also can be no genuine issue as to the facts which evidence the distressed state of the domestic industry. Whether these facts show that the DOE is, or is

not, managing its enrichment program consistently with the requirements of Section 161(v) is purely a question of law. This question involves nothing more than assessing the undeniable present state of the industry with what this Court determines to be the meaning of Section 161(v).

As to Count V, the procedural issue presented involves a comparison of the final criteria with those that were initially proposed and on which notice and comment procedures were had. After the variance between the text of the two sets of criteria is ascertained, the Court is then called upon to decide the legal issue of whether this variance is so great as to have required notice and comment procedures before the final criteria could have been lawfully adopted. The substantive issue of Count V requires the Court to decide whether the text of the criteria adopted by the DOE is consistent with the statute.

Trial is neither necessary nor appropriate to decide these legal issues. Trial would not establish any additional facts necessary to decide the issues presented. Trial would not be appropriate, moreover, because it would unnecessarily burden the Court and the parties, and because plaintiffs requires as speedy a resolution of these issues as is possible if they are to secure meaningful relief. The industry is in dire straits and, as mining and milling facilities continue to close, and labor forces disperse, it will become increasingly difficult to reconstitute a viable domestic industry. Summary judgment is clearly appropriate, and urgently required.

II. Summary Judgment on Count I Should Be Granted

Congress has long been concerned first to establish and then to maintain a viable domestic uranium mining and milling industry. When the 1964 amendments to the Atomic Energy Act were enacted, the Joint Committee

noted that the Government, faced with the fact that the United States had been "a have-not Nation" ten years before in terms of discovered uranium reserves, had "embarked upon an ambitious program of exploration for uranium" in order to supply the raw material product essential to both nuclear weapons and the development of peacetime applications. S. Rep. No. 1325, 88th Cong., 2d Sess. 1964, reprinted at 1964-2 U.S. Code & Ad. News 3105, 3114. As a result, "a substantial uranium mining and milling industry" has been created. *Id.* In 1964 the Government was the sole large-scale purchaser of U.S. uranium. Projections were that its future purchases would not be large enough "to support a viable domestic uranium industry" beyond the date (1970) when then-current Government purchasing contracts would expire. *Id.* Thus, the Committee noted, in the 1970s and beyond the domestic uranium industry would have to depend upon the civilian power program for its "primary market." *Id.*

In 1964, Congress enacted the Private Ownership of Special Nuclear Materials Act. One of the purposes of the legislation was to create this civilian market. The Act authorized both private ownership of uranium and enrichment of such privately owned uranium by the Commission. Congress was deeply concerned that the United States retain assured and reliable domestic supplies of uranium for the future nuclear industry. Indeed, Congress specifically observed that "[t]he maintenance of a domestic uranium mining and milling industry is an essential part of a sound nuclear industry and is also vital" to national security interests. *Id.* at 3115 and 3135. Provision for enrichment of privately-owned uranium was seen as "a desirable step in this direction." *Id.*

Enrichment of privately-owned uranium was authorized to begin in 1969. Some AEC officials projected that enrichment of foreign uranium intended for domestic use

might begin by mid-1975, because by that time "the civilian requirements are expected to be sufficiently high that the viability of the domestic industry would no longer be at stake." *Id.* at 3135. Because it was recognized to be impossible to predict the condition of the domestic uranium industry a decade hence, *id.*, the Commission's authority to enrich foreign uranium was made conditional. The Commission was "directed" by Section 161(v) "not to offer uranium enrichment services" for foreign uranium "to the extent necessary to assure the maintenance of" a viable domestic industry. *Id.* at 3120.[1] The Joint Committee noted that concern that had been expressed at its hearings as to the effect on the domestic industry of imports that could have "serious impact," particularly during periods of limited demand. *Id.* Accordingly, the bill contained a "flexible restriction" allowing the Commission "to review periodically" the condition of the domestic and world uranium markets and to offer enrichment only insofar as to do so would be consistent with maintenance of a viable domestic uranium industry. *Id.* The Joint Committee concluded that a statutory restriction on the importation of foreign uranium would not be appropriate, but that "it would be reasonable to place restrictions upon the performance of services by the Commission where the enrichment of foreign material would have an adverse effect on the domestic uranium industry." *Id.* at 3121.

[1] The AEC testified in 1963 and again in 1974 that it also had authority under other provisions of the Atomic Energy Act to impose, through conditions of restrictions on import licenses or facility licenses, limitations on the importation of both uranium or enriched uranium in order to maintain both the domestic uranium industry and the government's enrichment enterprise. *See, e.g.*, Private Ownership of Special Nuclear Materials, Hearings before the Subcommittee on Legislation of the Senate Committee on Atomic Energy, 88th Cong., 1st Sess. 30 (1963).

Thus, the context of the enactment of Section 161(v) was that a viable domestic uranium industry was deemed essential both to national security, and to the nascent nuclear power industry which was expected to supply increasing percentages of the nation's energy requirements. Purchases for military needs were expected to decline after 1970 and it was thought that civilian needs would have to create the market that would be necessary to maintain viability of the producer industry. Enrichment of foreign uranium was authorized in 1964 to begin about 1975 on the basis of demand projected for that later period. It was understood that conditions would have to be monitored, and a flexible enrichment policy for foreign uranium was established. The Commission was "directed" to use this flexibility to assure the continued viability of the domestic industry.

The Atomic Energy Commission originally took decisive action to carry out its obligations under the 1964 Act. In 1966, the Commission adopted enrichment criteria barring any enrichment of foreign source uranium for domestic end use.[1] In 1968 the Commission advised that it was continuing to review the restriction on enrichment of foreign uranium intended for domestic use, that it was considering a graduated withdrawal of restrictions, and that any relaxation of restrictions would be "consistent with reasonable assurance of the viability of the domestic uranium industry."[1] The Commission further advised that the criteria "which in its judgment would characterize a viable industry" would be economic factors such as the

[1] 31 Fed. Reg. 1679 (1966).

[1] *Status of the Domestic Uranium Mining and Milling Industry: The Effects of Imports: Hearings Before the Subcomm. on Energy Research and Development of the Senate Comm. on Energy and Natural Resources*, 97th Cong., 1st Sess. 415 (1981) (AEC: Statement on Uranium Supply Policies and Related Activities).

size of the market, the price of uranium, the size of domestic reserves, the rate of development of new reserves, the probable penetration of the domestic market by foreign imports, and the size of the export market. *Id.*

In testimony during these years the Commission repeatedly confirmed that the authority granted by Section 161(v) was only to be employed consistently with the economic viability of the domestic uranium industry. For example, in 1972 the Chairman of the Commission testified that any modification in the then-existing total import restriction would remain consistent with a growing domestic industry. In particular, he explained that any revision:

> "would be adjusted so as to take an unbearable load off American suppliers, but would still permit the growth of American industry. . . . If there are American reserves to be exploited the intention would be that those reserves would be exploited."[2]

The following exchange ensued:

> *Rep. Hosmer*: In other words, whatever this thing comes up to be, it will be on the basis of maintaining a viable and expanding raw materials industry in the United States?
>
> *Dr. Schlesinger*: Yes, sir.
>
> *Rep. Hosmer*: There is no question about that?
>
> *Dr. Schlesinger*: No, sir.[1]

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[2] *Nuclear Fuels; Regulation: Hearings on AEC Authorizing Legislation FY 1973 Before the Joint Comm. on Atomic Energy*, 92d Cong., 2d Sess. 2328 (1972) (testimony of James R. Schlesinger, Chairman AEC).

[1] *Id.*

Similarly, Commissioner Anders testified in 1974 that

> "Should there be any indication that the proposed Schedule is endangering domestic industry viability, U.S. self-sufficiency, or our national security, the Commission will reimpose restrictions or take such other steps as might be appropriate."[2]

In 1973 the Commission proposed a plan allowing the gradual removal of restrictions on enrichment of foreign uranium during the years 1977-83. 38 Fed. Reg. 32595 (1973). The plan was predicated on projections for nuclear power growth that have proved to be far too optimistic. Under this plan there were to be no restrictions on use of Commission facilities to enrich foreign uranium starting in 1984. After Congressional review, this plan was promulgated. The Commission stated that it "will monitor the extent of importation of foreign uranium for domestic use and its effect on the viability of the domestic uranium producing industry and on the President's objective of achieving a national capability for energy self-sufficiency." 39 Fed. Reg. 38016 (1974).

The fact that no enrichment of foreign uranium was allowed until 1977, and then only phased reductions of restrictions from 1977 to 1983 were permitted, indicates that at that time there was sufficient concern about the viability of the domestic industry to control foreign enrichment. It is anomolous that throughout this period the domestic uranium industry was healthier than it is today. Now, when the very existence of the domestic industry is threatened, DOE is allowing unrestricted domestic utilization of foreign source uranium. This

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[2] *Proposed Modification of Restrictions on Enrichment of Foreign Uranium for Domestic Use: Hearings Before the Joint Comm. on Atomic Energy*, 93rd Cong., 2d Sess. 6 (1974) (Testimony of Wm. A. Anders, Commissioner AEC).

perverse interpretation of the Congressional direction contained in Section 161(v) does not withstand even cursory scrutiny.

Plaintiffs' and *amicus'* papers filed in connection with Count II of the complaint detail the manner in which the DOE is currently manipulating its enrichment program to the detriment of the domestic uranium industry. The DOE's refusal to impose any restrictions on enrichment of foreign uranium is apparently part of the same overall program to reduce its costs, and therefore its prices, of enrichment. Both DOE's own studies and the affidavits attached to this motion attest to the fact – and surely this is a fact that the Government's lawyers cannot genuinely dispute – that this DOE policy is occurring at a time when the domestic uranium industry is in a desperate economic condition from which it may not recover.

In July 1982 the Grand Junction Area Office of the DOE prepared an analysis of the domestic uranium industry. That analysis determined that industry employment had fallen 50 percent in three years; 31 percent of production capacity had been shut down in the past year, and that an additional 31 percent was idle for lack of a market; production of U_3O_8 had fallen from 22,000 tons in 1980 to a projected 14,000 tons in 1982; the spot price had fallen to $19 per pound from its 1978 price of $43 per pound; domestic production costs were such that domestic producers could not afford to sell at prices "even approaching" current prices. Based upon these determinations the report concluded that "[T]he uranium industry is clearly in a state of depression" and "can hardly be viewed as being viable."[1]

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[1] *Status of the U.S. Uranium Industry, July 1982* (copy attached). Also attached is a DOE memorandum of August 9, 1982 indicating that these judgments were to be suppressed when the report was sent to Congress.

The attached affidavits establish that the conditions described by DOE in 1982 have become worse. Domestic production of uranium had declined from 43.7 million pounds in 1980 to 14.8 million pounds in 1984. Sabo Aff. ¶ 4, 6. Industry production in 1985 is expected to be less than 12 million pounds. *Id.* at ¶ 7. Industry employment has declined from 22,191 persons in 1979 to approximately 2,000 today. *Id.* at ¶ 8.

In New Mexico, one of the two principal producing states, production has declined from 8,539 tons in 1978 to 2,550 tons in 1983, with 1984 levels substantially lower. Biderman Aff. ¶ 6. Only one mill is operating in New Mexico, and only one mine. *Id.* at 8. By comparison, as recently as 1981 there were 38 mines and 5 mills operating in the state. *Id.* In 1978, six million feet of exploratory drilling were performed in New Mexico compared with only 100,000 feet of such drilling in 1983. *Id.* at 9.

The picture is the same in Wyoming, which once was another major uranium producing state. There production has declined from 7.53 million tons in 1980 to 0.472 million tons in 1984. Goodier Aff. ¶ 7. In 1980 there were 17 mines and 8 mills operating in Wyoming; now there are only 4 mines and 3 mills in operation. *Id.* at ¶ 9. Exploration has dried up in Wyoming as it has in New Mexico. *Id. at* ¶ 10. In 1979 approximately 5,300 persons were employed in uranium production in Wyoming; now only 850 persons are so employed. *Id.* at 11.

Demand for domestic source uranium is expected to decline through the year 2000. Garrow Aff. ¶ 3. The "U.S. uranium supply industry is deteriorating at an accelerating rate. . . ." *Id.* at ¶ 6. Firms are taking significant asset write-offs and write-downs in recognition of the reduced, or eliminated, earning power of these assets. *Id.* The Colorado Nuclear Corporation (CNC), a consulting firm specializing in the nuclear fuel cycle, concludes "that a

very limited number of domestic producers are [sic] likely to survive current market conditions." *Id.* If present conditions continue, CNC expects domestic uranium production levels will decline below 10 million pounds per year by the late 1980s. U.S. uranium demand will be about 40 million pounds per year. *Id.* Foreign source uranium may supply in excess of 60 percent of domestic requirements by the late 1980s. *Id.* The "domestic uranium industry in its present state cannot be considered viable." *Id.* Imports of uranium as a percentage of pounds consumed domestically have increased from 8.7 percent in 1980 to 58.2 percent in 1984. White Aff. ¶ 7, 8.

Two basic facts are therefore clear and beyond genuine dispute: (1) the domestic uranium industry is not viable and has no present prospect of becoming so;[1] (2) the DOE is not administering the enrichment program so as to try to assure such viability. It is of course true that not all of the industry's problems are traceable to the defendants' unwillingness to limit enrichment of foreign uranium. Some may be due to lowered expectations for nuclear power. Some are clearly due to the enrichment policies that have been written into the new generic enrichment contract which has been challenged in Count II of the complaint. Though causes of the problem may be several, we hardly expect to hear the defendants argue that there is no point in stopping the bleeding from one wound because the patient may die anyway from his other wounds. The DOE

[1] The DOE in 1984 purported to assess the industry's viability for the year 1983 and reached a conclusion opposite to that published by its Grand Junction Office in 1982. However, that conclusion was based on the bizarre assumption that viability of the industry can be said to increase the more the demand for its product contracts. See discussion *infra* in connection with Count V. The 1983 report does not put in issue any of the underlying industry facts recorded in the attached affidavits.

has a statutory obligation to conduct its enrichment program so as to assure to the extent it can the viability of the domestic industry. The agency clearly is not doing so, and this Court just as clearly has the authority necessary to "compel agency action unlawfully withheld or unreasonably delayed. . . ." 5 U.S.C. § 706 (1982); *Public Citizen Health Research Group* v. *Auchter*, 702 F.2d 1150 (D.C. Cir. 1983). Defendants should be required to conduct appropriate proceedings, pursuant to a schedule ordered by the Court, for the purpose of adopting criteria for the enrichment of foreign source uranium that will be consistent with the requirements of Section 161(v). Similar relief has been ordered in similar circumstances. *E.g., Assn. of American Railroads* v. *Costle*, 562 F.2d 1310, 1321-22 (D.C. Cir. 1972); *Sierra Club* v. *Gorsuch*, 551 F. Supp. 786 (N.D. Cal. 1982); *Mountain States Legal Foundation* v. *Andrus*, 499 F. Supp. 383 (D. Wyo. 1980).

* * * * *

IV. Conclusion

Plaintiffs are entitled to summary judgment on both Counts I and V. The Court should require DOE to initiate administrative proceedings to develop standards of conduct by which the enrichment program will be administered "so as to assure" the viability of the domestic mining and milling industry. In addition, the Court should set aside the final viability criteria promulgated by defendants under Section 170B since they were promulgated without proper procedures and are, in addition, in conflict with the authorizing statute.

Respectfully submitted this 10th day of July, 1985.

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MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS AND MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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B. The Secretary Is Vested With Broad Discretion In Implementing Section 161(v) of the AEA

In Count I plaintiffs allege that the DOE has violated Section 161(v) of the AEA by failing to adopt criteria that would limit the enrichment of foreign source uranium for domestic end use. In plaintiffs' view, restricting the importation of foreign source uranium is necessary to assure the maintenance of a viable domestic uranium industry. Plaintiffs allege additional violations of Section 161(v) in Counts III and IV of their Complaint, asserting that the use of the "fixed tails," "split tails,"[7] and "pre-produced inventory" policies contravenes this statutory provision by arbitrarily discriminating against, and preventing the

[7] Although there is no longer a live controversy with respect to the Count IV allegations involving purported use of a "split tails" policy, the legal arguments set forth herein and in argument IV on other provisions of the AEA apply to this claim assuming, *arguendo*, it is not moot.

development of, the domestic uranium industry. As is conclusively demonstrated by the statute and its legislative history, the DOE is vested with broad discretion in implementing Section 161(v), and there is no mandate under that AEA that the DOE take the action sought herein by plaintiffs.

The relevant portion of Section 161(v) requires that DOE establish criteria placing restrictions on foreign origin uranium *only* "to the extent necessary to assure the maintenance of a viable domestic uranium industry." This kind of language has been read by courts as vesting broad discretion with the agency. *Kerr-McGee Chemical Corp.* v. *United States Department of the Interior*, 709 F.2d 597, 601 (9th Cir. 1983). ("as the Secretary deems appropriate"). *See also Jean* v. *Nelson*, 727 F.2d 957 (11th Cir. 1984) ("as he deems necessary"). In this case, the use of deferential language coupled with the obvious congressional intent that DOE is to determine if restrictions will "assure the maintenance of a viable domestic industry" support defendants' position that there is no mandatory requirement to enforce with respect to DOE's administration of Section 161(v).

Careful consideration of the relevant legislative history of Section 161(v) lends further support to the agency's interpretation of this statutory provision. 42 U.S.C. § 2201(v) Section 161(v) of the Atomic Energy Act of 1954) was enacted in 1964 as Section 16 of the Private Ownership of Special Nuclear Materials Act, Pub. L. No. 88-489, 78 Stat. 602, and authorized the Atomic Energy Commission "to enter into contracts for producing special nuclear material from privately owned source material as well as enriching privately owned special nuclear material." S. Rep. No. 1325, 88th Cong., 2d Sess.,

reprinted in 1964 U.S. Code Cong. & Ad. News 3105, 3134. Included in § 161(v) was the following provision:

> And provided further, that the Commission, *to the extent necessary to assure* the maintenance of a viable domestic uranium industry, shall not offer such [enrichment] services for source or special nuclear materials of foreign origin intended for use in a utilization facility within or under the jurisdiction of the United States. The Commission shall establish criteria in writing setting forth the terms and conditions under which services provided under this subsection shall be made available for source or special nuclear material of foreign origin intended for use in a utilization facility within or under the jurisdiction of the United States, Provided, that before the Commission establishes such criteria, the proposed criteria shall be submitted to the Joint Committee, and a period of forty-five days shall elapse while Congress is in session. . .

Pursuant to this statutory directive the AEC, in 1966, issued criteria under which enrichment services would be made available. 31 Fed. Reg. 16479 (December 23, 1966). In these criteria, the AEC included a restriction on the use of foreign origin uranium as feed material for enrichment where the enriched uranium is intended for use in a domestic utilization facility. The restriction on the use of foreign origin uranium was intended to be a temporary measure, to help assure the viability of the domestic industry during the transition from the purely government market for uranium defense purposes to a commercial market.[8] It was not until 1974 that the AEC established

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[8] *See* Proposed Modification of Restrictions on Enrichment of Foreign Uranium For Domestic Use: Hearings Before the Joint Committee on Atomic Energy, 93rd Cong., 2d Sess., 4-5 (1974) (Statement

new criteria under which the restriction was gradually phased out over a period of years, resulting in no restrictions after 1983. 39 Fed. Reg. 38016 (Oct. 24, 1974). The criteria addressing restrictions on enriching foreign origin uranium have not been amended or modified since that time.

The pertinent language of Section 161(v) was originally proposed by Kerr-McGee Oil Industries, Inc., a major domestic uranium producer and appearing herein as amicus supporting plaintiffs, during the hearings before the Joint Committee on Atomic Energy on the Private Ownership of Special Nuclear Materials.[9] In support of such language, Mr. McGee testified that "Congress should provide statutory standards to guide the AEC in determining whether to enrich foreign material for domestic use" and that the AEC's "decision that the statutory standard has been met shall be subject to review by [the Joint Committee]." *Id.* at 156. The committee draft included the language substantially as proposed by Kerr-McGee and this provision was enacted into law without amendment.

In the Senate Report accompanying the Private Ownership Legislation, the Committee emphasized the congressional intent to provide the AEC with the utmost flexibility and discretion in its implementation of Section 161(v):

> [T]he flexible restriction contained in the Committee bill will allow the Commission to review periodically the condition of the domestic and world uranium markets and to offer enrichment services on a basis

of William A. Anders, Commissioner of the Atomic Energy Commission), appended hereto as Exhibit E.

[9] *See* Private Ownership of Special Nuclear Materials, 1964, Hearings Before the Subcommittee on Legislation of the Joint Committee on Atomic Energy, 88th Cong., 2d Sess. 197-198 (1964), appended hereto as Exhibit F.

> which will assure, *in [AEC's] opinion*, the maintenance of a viable domestic uranium mining and milling industry. S. Rep. 1325, 88th Cong., 2d Sess., *reprinted in* 1964 U.S. Code Cong. & Ad. News 3105, 3120 (Emphasis Supplied).

Further, in the section-by-section analysis of Section 161(v), the Committee states:

> The direction to the Commission not to offer services under this subsection for uranium of foreign origin is flexible both as to the duration and degree of the restriction. . . . Accordingly, the language of the bill will permit the Commission to survey periodically the condition of the domestic and world uranium markets and to offer or refuse to offer its enrichment services on a basis which will assure, *in its opinion*, the maintenance of a viable domestic uranium industry. *Id.* at 3135. (Emphasis supplied).

Clearly, Congress, in enacting Section 161(v), intended the Commission (now DOE) to have full discretion to determine whether or not restrictions should be placed on enrichment of foreign origin uranium, subject only to review and oversight of the cognizant congressional committees.[10]

The fact that Congress has considered, and rejected legislation which would have required *mandatory restrictions* on importation of foreign origin uranium provides

[10] Under § 161(v), the criteria containing the agency's policy decision regarding restrictions on enrichment of foreign origin uranium or the withdrawal of such restrictions must be presented to the cognizant congressional committees 45 days prior to the date such criteria becomes effective. The purpose of the "lay and wait" procedure is to permit Congress to enact a statute requiring different agency action. *Consumer Energy, etc.* v. *F.E.R.C.*, 673 F.2d 425, 474 (D.C. Cir. 1982).

further evidence that the DOE's discretion in this area is not subject to judicial review. In 1982, Senator Domenici questioned the Department of Energy's policy of permitting the enrichment of foreign origin uranium for use in domestic facilities, and introduced an amendment to the Nuclear Regulatory Commission Authorization Act which would have required the NRC to issue criteria restricting the importation of source material and special nuclear material. 128 Cong. Rec. § 2968-2970 (daily ed. March 30, 1982). The conference committee that considered the amendment changed the language substantially, and the conference bill contained a proviso which would have required the Secretary of Energy, when foreign uranium imports reached a level of 37.5%, to revise its enrichment criteria "so as to encourage the use of domestic origin uranium in domestic nuclear powerplants." 128 Cong. Rec. S 13054 (daily ed. Oct. 1, 1982) (Remarks of Senator Dominici); *See also*: 128 Cong. Rec. H 8803 (daily ed. Dec. 2, 1982) (Remarks of Rep. Udall and Rep. Lujan).

Even this provision, however, was rejected by the House of Representatives, *Id.* at H 8809, and a substitute provision was agreed to by both House. 128 Cong. Rec. S15316. (daily ed. Dec. 16, 1982). In the substitute measure,[11] Congress deleted all references to mandatory restrictions on importation of foreign origin uranium and, instead, required, *inter alia*, the Secretary of Energy to *request* the Secretary of Commerce to initiate an investigation pursuant to 19 U.S.C. § 1862 if uranium imports from executed contracts or options are projected at a level of 37.5% for a two-year period. To date, the uranium imports or projections on future imports have not reached these levels for a two-year period. *See* 1984 Viability Determination, Exhibit B.

[11] The substitute provision is codified at 42 U.S.C. § 2210b.

Plaintiffs would have this Court rewrite the statutory provisions and impose the mandatory criteria that Congress has already rejected under which enriching services may be performed. Indeed, plaintiffs are requesting the Court, *inter alia*, (1) to require DOE "to adopt criteria relating to enrichment of foreign-source uranium for domestic end use sufficient to assure the maintenance of a viable domestic uranium industry;" (2) "to prohibit DOE from enriching foreign uranium for domestic end use—pending adoption of limitations upon enrichment of foreign uranium;" (3) to prohibit DOE from implementing a "fixed tails" policy in its enrichment contracts; and (4) to prohibit purported sales of foreign-origin uranium from the Government's stockpile—all factors concerning the terms and conditions under which uranium enriching services may be provided, including restrictions on the contracts of foreign origin uranium in domestic utilization facilities.[12] Such action is contrary to the broad discretion vested in DOE to determine whether these restrictions are indeed necessary to assure domestic viability.

As defendants have shown above, Congress intended the agency to have great flexibility in making a determination whether or not to impose restrictions upon the enrichment of foreign origin uranium for use in domestic reactors, and, further, to establish criteria containing the terms and conditions under which enrichment services may be offered. Here, the DOE acted within its discretion under the legislative framework and has not reimposed restrictions on the enrichment of foreign source material. Review of this grant of authority is performed by the cognizant congressional committees. Of course, if Congress determines that the agency's actions are not in accord

[12] *See* Complaint pp. 24-25.

with its desires, it can take the legislative action it determines is warranted.[13]

Since Congress has expressed its clear intent to leave the question of placing restrictions on foreign origin uranium to agency discretion by refusing to enact any mandatory guideline for such restrictions, it would be inappropriate for this Court to legislate this change by granting plaintiffs the relief they seek. *American Dredging Co.* v. *Local 25, Marine Div., Int. U. Op. Eng.*, 338 F.2d 837, 850 (3d Cir. 1964); *In re Knight Realty Corp.*, 370 F.2d 624 (3d Cir. 1967), *rev'd on other grounds* 391 U.S. 471. *See National Automatic Laundry and Cleaning Council* v. *Shultz*, 443 F.2d 689, 706 (D.C. Cir. 1971), (court held that positive action by Congress rejecting limiting amendments is a clear sign of Congressional intent), *see also Liberty Mutual Insurance Company* v. *Horton*, 275 F.2d 148, 153 (5th Cir. 1960), (it is the function of the judiciary to construe the language of the statute, and not to legislate). Thus, the plaintiffs may not maintain an action where the only relief that may be granted would result in judicial legislation.

Additionally, even though the Secretary has issued a determination of nonviability pursuant to Section 170B of the AEA, this determination does not impose any additional duties on defendants under 161(v).[14] Further, plain-

[13] *See* for example, proposed amendment H.R. 3257, 99th Cong., 1st Sess. (1985). H.R. 2094, 99th Cong., 1st Sess. (1985) and Senate Resolution S. Res. 183, 99th Cong., 1st Sess. (1985). These bills clearly evidence that Congress is actively monitoring DOE's actions.

[14] The Secretary has referred the question of causation and possible curative actions in the form of import controls to the U.S. Trade Representative because, in the Secretary's view, his expertise and the expertise of other Executive Branch agencies charged with international trade juridiction makes the trade representative and these agencies the most appropriate forums for consideration of this complex problem. *See* Letter to Clayton Yeutter from John S. Herrington, Exhibit B.

tiffs have cited no factual support for the position that the imposition of controls on source or special nuclear material of foreign origin would "assure the maintenance of a viable domestic uranium industry." To the contrary, plaintiffs' acknowledgment that the domestic uranium industry is depressed in part because of "lowered expectations for nuclear power" and the large inventories of uranium that have accumulated because of this decrease in demand is evidence that restricting imports could not assure the maintenance of a viable domestic uranium industry. Plaintiffs' Memorandum In Support Of Summary Judgment at 13 and 18.

Finally, although plaintiffs do not address it in their motion for summary judgment on Count I, they allege in their Complaint that DOE has "a duty to request the Nuclear Regulatory Commission (NRC) to implement restrictions on the importation of enriched uranium pursuant to Sections 53 and 69 of the Atomic Energy Act, 42 U.S.C. §§ [2073] and 2099. . . ." Complaint D, ¶ 16. These statutory provisions relate solely to licensing for imports and, as such, impose no affirmative duty on the Secretary as suggested by plaintiffs. For this reason, plaintiffs fail to state a claim upon which this Court may grant the relief requested.

The licensing provisions of 42 U.S.C. §§ 2073 and 2099 were transferred to the NRC under Pub. L. No. 93-438, Oct. 11, 1974. 88 Stat. 1233. The NRC, an independent regulatory agency, has the authority to license or prohibit the licensing of importation of source or special nuclear material only where such action is based upon considerations of the common defense or the health and safety of the public. The NRC has no authority to regulate import

licenses to preserve the mining industry's economic health—the factual predicate of plaintiffs' request. Thus, even if DOE had a statutory obligation to request the NRC to implement these restrictions, there is no legal basis for the NRC to act. For these reasons plaintiffs have no cause of action against defendants under 42 U.S.C. §§ 2073 or 2099.

* * * * *

THE SECRETARY OF ENERGY
WASHINGTON, D.C. 20505

September 26, 1985

MEMORANDUM FOR The President

Pursuant to the requirements set forth in section 170B of the Atomic Energy Act of 1954, 42 U.S.C. 2210b, I am transmitting the annual determination of the viability of the domestic uranium mining and milling industry.

Section 170B directs me to make an annual determination for the years 1983 to 1992. The attached determination covers calendar year 1984. The determination has been made in accordance with the criteria established by regulation (10 C.F.R. §§ 761.1-.8 (1984)). The annual assessment of the industry's condition, prepared by the Energy Information Administration, is also attached. This study, "Domestic Uranium Mining and Milling Industry: 1984 Viability Assessment," September 1985, provides the underlying information and analysis for this determination.

I have determined, in accordance with the provisions of the Act and the regulations, that for calendar year 1984 the domestic uranium mining and milling industry was not viable. In view of this determination, I have authorized the Department of Energy to offer its customers for enriched uranium an option that, if exercised, could have the effect of increasing domestic uranium sales. I have also directed the Department to postpone for one year a plan to feed some of its own uranium stockpile into enrichment plants.

In addition, I have requested the United States Trade Representative to examine this situation with a view to determining the appropriate available courses of action

under U.S. trade laws. The Trade Representative has been requested to provide preliminary recommendations within three months.

/s/ John S. Herrington
JOHN S. HERRINGTON

Attachments

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 84-C-2315

WESTERN NUCLEAR, INC., ET. AL., PLAINTIFFS

v.

F. CLARK HUFFMAN, ET. AL., DEFENDANTS

REPORTER'S TRANSCRIPT OF MOTIONS HEARING

Proceedings before the HONORABLE JIM R. CARRIGAN, Judge, United States District Court for the District of Colorado, beginning at 1:33 o'clock p.m., the 5th day of June 1986, in Courtroom C203, United States Courthouse, Denver, Colorado.

APPEARANCES:

The plaintiffs appearing by their attorneys, Shaver and Licht, by HARLEY W. SHAVER, Esquire, 1212 Century Towers, 720 South Colorado Boulevard, Denver, Colorado 80222-1934; and Covington and Burling by PETER J. NICKLES, Esquire, 1201 Pennsylvania Avenue, N.W., P.O. Box 7566, Washington, D.C. 20044;

The defendants appearing by their attorneys, MARYANN CLIFFORD, Esquire, Department of Justice, Civil Division, Room 3728, 10th and Pennsylvania Avenue, N.W., Washington, D.C. 20530; I. A. FINGERET, Office of General Counsel, Department of Energy, 1000 Independence Avenue, S.W., Washington, D.C. 20585; and [2] STEPHEN D. TAYLOR, Esquire, Assistant United States Attorney, Twelfth Floor Federal Office Building, 1961 Stout Street, Denver, Colorado 80294;

WHEREUPON, the following proceedings were held:

• • • • •

[3] **PROCEEDINGS**

THE COURT: Please be seated.

Good afternoon, Counsel,

This is 84-C-2315, Western Nuclear, Inc., et al, vs. F. Clark Huffman, et al, which comes on for hearing of all pending motions today.

Will counsel please enter their appearances for the record? Plaintiff first.

MR. SHAVER: Good afternoon, Your Honor. My name is Harley Shaver of the firm of Shaver and Licht, on behalf of the plaintiffs. Counsel with me is Peter Nickles of Covington and Burling on behalf of the plaintiffs and amicus Uranium Producers Association.

THE COURT: Has he been admitted for purposes of this case?

MR. SHAVER: Yes, Your Honor, he has.

THE COURT: Thank you very much.

MR. TAYLOR: Good afternoon. My name is Stephen D. Taylor, Assistant United States Attorney.

And I would like to introduce Maryann Clifford. She is with the Department of Justice, the Civil Division of Field Programs. She is admitted to the Bars of Maryland and D.C.

Sitting on her right is Dave Thomas, he's Deputy director of the Enrichment Operations for the Department of Energy. And sitting across from Ms. Clifford is Averum Fingeret, who is the [4] General Counsel for the Department of Energy.

THE COURT: Would you mind, Mr. Taylor, please giving me that last name again?

MR. TAYLOR: Averum Fingeret, and he's from the Office of General Counsel, I'm promoting him unintentionally.

THE COURT: There are, as I'm sure you know, several motions pending, they are substantial motions.

For the record, so that things are clear, in the event of an appeal, on September 19, 1985, I entered an order which granted the plaintiff's summary judgment on the Count Two. This complaint, for some reason identifies the claims as counts, as in a criminal indictment, so we are going to call them counts rather than claims. But you can call them anything you want to.

So that left the remaining aspects of the summary judgment motions, motion to dismiss and cross motions for summary judgment, pending. I would like to take them in the order of count numbers that are set out in the complaint, except as to each count I would like to hear and consider first the defendants' motion for a stay of proceedings as I want to consider that separately as to each count, because I think the grounds are different for the various counts, and the reasons involved are different. So we will hear counts – matters directed to Count One first, and then we will proceed to Count Three.

MR. TAYLOR: Your Honor, just as a housekeeping matter, may I be excused?

[5] THE COURT: Yes, you may, Mr. Taylolr.

MR. TAYLOR: Thank you.

MR. NICKLES: Your Honor, may it please the Court, my name is Peter Nickles appearing both on behalf of the plaintiffs and on behalf of the Uranium Producers Aasociation, and I have allocated responsibility with Mr. Shaver to take Count One.

I might tell the Court at the outset that this count, in our view, is really the heart of this case, and we present it with some sense of urgency. It asks the Court, in effect, to apply what we perceive to be the clear mandate of Section 161(v) of the Atomic Energy Act. In our view, Your Honor, this is a simple question of statutory interpretation. The arguments raised by the defendant as to lack of

reviewability, lack of implied right of action, have already been resolved by this Court.

THE COURT: You may proceed.

MR. SHAVER: Thank you, Your Honor.

This Court has already resolved and rejected the principal arguments of the defendant as to lack of reviewability and lack of cause of action, so to speak, when it decided Count Two. The same arguments were raised there. The Court's resolution of those arguments represent the law of the case. So we are confronted with a straightforward question and that is whether under 161(v) the Department of Energy, as the successor to the Atomic Energy Commission, is mandated to take certain actions or has discretion to take whatever action it should choose.

[6] I would like to read, Your Honor, the particular language that is the focus of our summary judgment motion. The language is, "Provided further that the Commission, now the Department of Energy, to the extent necessary to assure the maintenance of a viable domestic uranium industry, shall not offer such services," those are enrichment services, "for source or special nuclear materials of foreign origin intended for use in a utilization facility within or under the jurisdiction of the United States."

Now, it is our position, as the plaintiffs, that inasmuch as the Department of Energy has already declared formally under a different provision of the Atomic Energy Act that the industry, the domestic uranium industry, is not viable as of calendar year 1984.

THE COURT: Let me stop you right there.

Does the government dispute the fact of nonviability of the industry at this time?

MS. CLIFFORD: Your Honor, as to 1984, calendar year 1984, the finding would be September of 1985 they

are not viable is not disputed. I cannot speak for the department as of today, although—

THE COURT: Has there been any finding that it is resuscitated?

MS. CLIFFORD: No, Your Honor.

THE COURT: So it was found to be dead, at least nonviable?

[7] MS. CLIFFORD: Particularly under Section 171(b) of the Atomic Energy Act.

THE COURT: And there has been no finding to the contrary since then so I suppose we can assume that it's still not viable?

MS. CLIFFORD: The Secretary will be required, within the next year, to make another viability determinations, by statute, that will be done by September.

THE COURT: So we are still operating on the one that was done as to the year 1984?

MS. CLIFFORD: That's correct.

THE COURT: All right.

Thank you very much, Ms. Clifford.

MR. NICKLES: I might say, Your Honor, that the record contains affidavits, and, of course, the amicus present situation that the states of which only the affidavit from the Secretary of Energy from the State of New Mexico attesting to the date as of the date of those affidavits that the industry was sinking even further on this prior low situation. So we start with what is undisputed and that is that the industry is not viable. The statute says that the DOE shall not offer its enrichment services to foreign source uranium, if, in fact, the industry is not viable. We say that there is a mandate the Department has ignored, continues to ignore. Indeed, Your Honor, in the current rulemaking, which the Department cites as the basis for staying action by this Court, the Department continues to take the [8] position that it should not do anything under

Section 161(v), not because it disputes the fact that the industry is nonviable but because principally it believes it would be untoward effects on its enrichment enterprise.

And so what has happened, Your Honor, and we see this in the record, not only in the briefs of the Department of Energy but in the briefs filed by the utilities, that rather than accepting what Congress has already directed, the Department believes it has infinite discretion to decide for itself, in light of enrichment enterprise and what it perceive to be all the causative factors respecting the potential ultimate demise of the industry, that it can do nothing.

Now, the Court will recall that this industry is a creature of the federal government. For years this industry depended on the fact that the government was purchasing its product, and so it developed many entities in this industry. Accordingly, when the government saw in 1964, that it should create a civilian industry, it enacted in 161(v) a protective mandate, which said to the Atomic Energy Commission, as government purchases phase out and as the civilian industry grows. You must assure, to the extent necessary, the maintenance of a viable domestic uranium industry. And then in 1974, Your Honor, as the Atomic Energy Commission, and then successor, saw that the industry was growing and profiting, it developed a schedule for phaseout of the 100-percent preclusion of enrichment of foreign [9] source uranium, looking in 1983 to a situation where there would be no preclusion of the enrichment of foreign source uranium and that was the situation in 1984. And what has happened since that time is that the industry is flat on its back.

Now, Your Honor, we have set forth at great length in our briefs the legislative history leading to this statute 161(v), the national security interest that the Congress had in mind when the it saw to it that this industry, this civilian

nuclear industry, would be created, and there were hearings, Your Honor, at the time the schedule for phaseout was enacted by the Commission.

And there is one quote, Your Honor, that is particularly apropos that I would like to briefly read to the Court, that is the quote from Commissioner Andres of the Atomic Energy Commission, who of testified in 1974, when this was before the Congress, the schedule for phaseout of the restriction, Commission Andres said to Congress, "Should there be any indication that the proposed schedule is endangering domestic industry viability, U.S. self-sufficiency or our national security, the Commission will reimpose restrictions or take such other steps as might be appropriate."

So we speak to the Court with a great sense of urgency. We need the Court to tell the Department to do its duty under the statute. What does the Department say in response to what appears; at least to the plaintiff, to be the clear mandate of 161(v)? First, the government says there is no right of action. [10] That is wrong. The Court held it was wrong, and specifically, Your Honor, Section 181 of the Atomic Energy Act specifically incorporates the provisions of the Administrative Procedure Act, and we are seeking to have the Court direct that agency action unlawfully withholding it be implemented.

The government also says that there is a prohibition on this type of action under Section 221 of the Atomic Energy Act, which precludes suits against individuals for violations of the Act. This is not that situation. This is a suit against the Department for failing to fulfill its statutory mandate. And the Court accepted those arguments when it decided in September of 1985 Count Two.

The Department also says to the Court, look at section 170(b), that was enacted in 1982, because somehow that supersedes or changes the mandates of 161(v), and, as I

understand the argument, it is, Your Honor, that under 170(b), the Department is directed, its secretary is directed to make these annual findings of viability and even though the same word "viability" is used in both 170(b) and in 161(v), they may mean different things. And that even though under 170(b) there is a finding of nonviability, all that's supposed to happen is there to be a reference over to the United States Treasury representatives.

Now, there is absolutely, Your Honor, no indication anywhere in the statute that somehow Congress had in mind a change in the mandate of 161(v). The Department's argument seems to lie [11] in its reading of various aspects of the legislative history. And on that point, Your Honor, I'd like to read to the Court a statement that Senator or Domenici, the chief sponsor of the 170(b) legislation submitted to the Department of Energy, about two months ago in connection with the Department's rulemaking. Senator Domenici says, "There are two specific points in the Department's analysis which relate to the legislative history of Section 170(b) of the Atomic Energy Act. These are the amendments made at my urging to the Atomic Energy Act. First, the Department claims that the Congress specifically rejected legislation requiring mandatory restrictions on imports. That is not accurate. The Senate passed such restrictions and the House never considered the same proposal. A conference of House and Senate members debated the issue for nine months and in the end, after rejecting the Senate proposal by one vote the conferees settled on a different approach. The key to the compromise, as it was finally passed, was that the Secretary of Energy was required to make an annual finding of viability relating to the mining industry. This brings me to the second point of inaccuracy in the Department's legislative analysis. The Department believes," this is what they have argued to this Court, "that this annual finding is unrelated

to the statutory requirement that the Separtment maintain the viability of the mining industry. This is an absurd view. Throughout the legislative history of these amendments, I made clear that the need for this annual finding was dictated by [12] the fact that the Department had failed to investigate the viability of the industry since 1973." That was the time period, Your Honor, when the Atomic Energy Commission adopted this schedule for phaseout of the 100-percent restriction. "The department has now made that finding," of nonviability, "and has discovered the obvious, that is, that the industry is not viable. The Department has failed to act as required by law, however, and I believe that, as I stated earlier, that this is principally out of self-interest."

There is no argument, the Department is seeking to enhance its enrichment empire at the cost of the industry, which is in despair. The only discretion, if there is any discretion, is for the Department to show, by a rulemaking, that there is some reason to permit something other than 100-percent domestic requirements, so to speak, that is a complete preclusion as there was back in 1973 when the industry was in much better shape than it is today, 100-percent preclusion of enrichment of foreign source uranium. And one does not avoid that mandate, Your Honor, by arguing policy matters to the Court. Those policy matters can be addressed to Congress, if the Department wishes. The Congress has spoken, the Congress had mandated action.

Your Honor, we have requested, as a matter of summary judgment, in fact, in effect, three separate prongs of relief. Number One, we believe, in light of the despair and urgency of the matter, that the Court should direct that the Department [13] immediately impose the 100-percent restriction on enrichment of the foreign source uranium that existed prior to the adoption by the Atomic Energy

Commission in 1974 of the phaseout. There is no question as to the nonviability of the industry, there is no question as to the need urgently and immediately to do something to save it before the disappears entirely. This is completely attested to by the affidavits from New Mexico and Wyoming and by the defendants' own analysis.

Number Two, we ask that the Court order that the Department immediately commence a rulemaking under 161(v) and announce within 30 days if, and the basis for, any view that the Department may have that the preclusion for the indefinite future should be anything other than 100 percent. And, in our view, there can be no basis, absolutely no basis, to impose anything other than a complete preclusion on the enrichment of foreign source uranium.

THE COURT: What's the second item of relief that you are seeking?

MR. NICKLES: Your Honor, the second item of relief is that the Department would be ordered within 30 days to issue a notice of proposed rulemaking and in that notice to explain why if there is any basis for the Department to believe that there should be imposed for the indefinite future as a rule under 161(v), something less than a 100-percent preclusion on the enrichment of foreign source uranium. In other words, we believe, as of the [14] date of the issuance of the Court's order, there should be imposed a 100-percent preclusion as there was for many years prior to 1974, because of the urgency of the matter there is authority to do that, there is a necessity to do that.

Secondly, the Department should be ordered, within 30 days, to propose a rule that will bind it with regard to its enrichment services and to explain in a rational basis why that hundred-percent immediate preclusion should not be extended indefinitely.

And, finally, the defendant should announce within 90 days a final rule that will give the industry a basis upon which to plan the resuscitation of its future.

Your Honor, this is a matter of great importance, of great urgency, the facts are compelling, the statute is mandatory, the Department is hiding behind issues of standing, reviewability, issues that the Court has rejected.

I thank the Court for giving us this argument, and I impress upon the Court the need for immediate action.

That's all I have at this time.

THE COURT: Very well.

Thank you very much.

Ms. Clifford, do you wish to be heard as to Count One, or the defendants' motion for stay as to Count One?

MS. CLIFFORD: Yes, Your Honor.

Thank you.

[15] Your Honor, defendants, in this case, agree that the case and the heart of the matter of plaintiffs' complaint is whether or not the Department of Energy should be required to institute restrictions on the enrichment of foreign source uranium. However, Your Honor, while we agree, and, in fact, have found that for calendar year 1984 the industry was not viable, we agree that they are financially troubled. However, we do not agree that placing the kinds of restrictions that they are asking, particularly their request for injunctive relief, would give them any of relief that they seem to feel it would provide them.

Your Honor, while counsel—

THE COURT: Isn't that a matter that you should address to Congress and get the—don't you have an obligation under the present statute that requires that—

MS. CLIFFORD: No, Your Honor, we don't.

THE COURT: —that requires you do everything you can to make the industry, the domestic industry, viable?

MS. CLIFFORD: Your Honor, the statute being interpreted by the Secretary and I think on its fact it's clear, that the—that 161(v) of the Atomic Energy Act permits and indeed requires the Secretary to make a determination in, the first instance, whether or not imposing restrictions or enrichment would provide any benefit to the industry.

Your Honor, I would like to point out—

THE COURT: Where would you—would you point that out [16] in the statute for me, please?

MS. CLIFFORD: Your Honor, the language of 161(v) states that, and I quote, that the Commission, to the extent necessary, to assure the maintenance of a viable domestic uranium industry, shall not offer such services for source of special nuclear materials of foreign origin intended for use in the utilization within the jurisdiction of the United States. Your Honor, plaintiffs have relied on the word "shall" as being mandatory, and we agree it's—we don't dispute the fact that "shall," itself, normally interpreted as being a mandatory term. However, the clause prior to that requires the Secretary make a determination as to whether or not those kinds of controls would assure or intend to assure the maintenance of a viable domestic industry. Curiously, plaintiff has cited the urgency of the matter, and yet they have made no attempt to demonstrate that these enrichment restrictions would help them at all. I think the paper that the amicus filed with Your Honor, the amicus utility company, demonstrates clearly that the harm would befall them, would befall consumers of nuclear power, of energy, would befall the Department of Energy, we do not dispute that.

Your Honor, if I may, by way of background, at the time Section 161(v) was enacted in—

THE COURT: What you are saying it's in the economic interest of the power industry to be able to use foreign source uranium, is that your point?

[17] MS. CLIFFORD: Your Honor, that is not necessarily it unless there is economic interest and it's disputed.

THE COURT: That's why they have got an interest in this lawsuit?

MS. CLIFFORD: They have an interest in this lawsuit because if an injunction were entered, many of these utilities have entered into contracts, long-term contracts, to purchase foreign uranium, and if they remained under those contracts and were unable to bring it to the United States to enrich it here, they would be left with a difficult decision of taking that uranium and having it enriched overseas, which they are able to do, at prices probably less than they could have it done in this country. But at the same time they have contracts with the Department of Energy, long-term contracts, to have their uranium enriched here. Your Honor, there is a real dilemma and that even Congress has recognized in that the bills that have been—that are before Congress now, even, provide that the contracts in existence for the purposes of foreign uranium would be grandfathered in, and that's why the injunctive relief, the injunctive aspect of plaintiff's claim.

THE COURT: There is no such statute now?

MS. CLIFFORD: Pardon me?

THE COURT: There is no such statute?

MS. CLIFFORD: No. There are only bills pending before Congress. There have been numerous bills over the years.

[18] Your Honor, the reason, one of the main reasons, that 161(v) is not workable in today's marketplace—

THE COURT: Are we talking about 42 U.S. Code, Section 2201(v)?

MS. CLIFFORD: That's correct, Your Honor.

THE COURT: Would you mind referring to it in that form? I don't have the Act in the original form in front of me. If you give me citations, it would help if you give me

U.S. Code citations. Judges don't wander around dealing with the original sections and acts, they deal with the Code. We don't even have time to deal with the sections often enough.

MS. CLIFFORD: Your Honor, at the time that 2201(v) was enacted in 1964, there was nowhere else for the utilities to go to have the uranium enriched outside of the Soviet Union. We had a monopoly on enrichment at that time, so the restrictions that the Department of Energy, or at that time the Atomic Energy Commission, had available to it was meaningful, it's not meaningful in this marketplace, we submit, Your Honor, and—

THE COURT: Isn't the remedy to get the statute amended? I have got to follow the statute as it exists, not as it might be bettered.

MS. CLIFFORD: Your Honor, as it exists, we submit that there is discretion to the Secretary to determine whether or not—

THE COURT: Would you help me find that in 2201, please? [19] I'm just not following that argument.

MS. CLIFFORD: Your Honor, we submit that the language that the—to the extent necessary to assure the maintenance—

THE COURT: Can you tell me just exactly, is that in (v), capital A, or capital B, or what?

MS. CLIFFORD: Your Honor, I just don't have that section with me but it's in 2201(v), I believe it is the italicized clause there that begins "That the Commission."

MR. NICKLES: Your Honor, under Capital B, as in boy.

THE COURT: "Provided that the Commission, to the extent necessary, to assure" and so forth, is that what you are talking about?

MS. CLIFFORD: That's correct, Your Honor.

It is our contention, Your Honor—

THE COURT: Let me read it first, please.

It says, the language you are talking about says, "And provided further that the Commission, which would have dealt with the Atomic Energy Commission and now deals with the Department of Energy, we can concede that—

MS. CLIFFORD: That's correct.

THE COURT: —to the extent necessary to assure the maintenance of a viable domestic uranium industry, not offer such services for source or special nuclear terms of foreign origin intended for use in a utilization facility within or under the jurisdiction of the United States." That's the language to which [20] you refer?

MS. CLIFFORD: That's correct, Your Honor.

THE COURT: And would you help me understand what it is in that that gives the Commission discretion?

MS. CLIFFORD: Well, Your Honor, it's our view and we believe that it's buttressed by the legislative history on that provision which is cited in Exhibit E and A to our original motion for summary judgment. That language of the legislative history interpreting that language states that it is to be a flexible restriction, and that the Secretary is to exercise his or her opinion. And it is our view that Congress intended that because of the complexities of making this kind of determination and the impact it would have that the Secretary necessarily would be vested with discretion to determine whether this kind of restriction would, in fact, tend to assure or would assure the maintenance of a viable domestic industry.

Your Honor, we are not saying that viability means one thing in 170(b) and that it means a different thing in 2201(v), rather we are saying that the Secretary has made a determination that these restrictions would not help the industry, and, in fact, would harm others, and in the long run would—

THE COURT: Those are all—those are just policy arguments. I'm not a policy-making board or I'm not in Congress, I'm simply trying to figure out what the law says so I can follow it, that's what I'm sworn to do. To me it says that the agency, [21] the Department of Energy, shall not offer such services for source or special nuclear materials of foreign origin—period. In effect, I don't see how there is any discretion in that language.

MS. CLIFFORD: Your Honor—

THE COURT: How could it be any clearer than saying "shall not offer?"

MS. CLIFFORD: Because, Your Honor, of the clause there which provides that there must be a determination that it will assure the maintenance of a viable domestic industry. Your Honor, we submit that the preliminary finding of the Department of Energy is that it will not.

Perhaps, Your Honor, at this point I should address myself to the stay because I think that the fact that the Court is being asked, in the first instance, to interpret a statute that the Secretary should interpret in the course of rulemaking, plaintiffs, have, in fact, asked for rulemaking in their complaint. The Secretary has instituted a rulemaking—in January of this year rulemaking was instituted, establishing new proposed criteria under this section of the Act. The record is now closed on that rulemaking, Your Honor, and the defendant is making every effort to proceed expeditiously to issue a final rule and to lay that final rule in front of Congress for the 45 days required by statute.

We submit, Your Honor, that it would not give effect to the provisions of 42 U.S.C. 2201(v) if this Court were to rule [22] prior to completion of the rulemaking, and an opportunity for Congress to determine whether action is needed.

THE COURT: How long has this case been pending? How long? We have given the agency a long time to act, it seems to me.

MS. CLIFFORD: Your Honor, the case has been pending—

THE COURT: Since—

MS. CLIFFORD: Quite some time.

THE COURT: It was filed in 1984.

MS. CLIFFORD: Pardon me, Your Honor?

THE COURT: It was filed in 1984. I can look up the complaint. Would you give me the filing date?

MR. SHAVER: December 7th, 1984.

THE COURT: So you have had a year and a half to proceed with the rulemaking, or anything. It takes as long to do that as it takes to appoint a Federal Judge in Colorado, I guess.

MS. CLIFFORD: Obviously part of the rulemaking which deals with the Count Two criteria that was the subject of your decision in September.

THE COURT: Right.

MS. CLIFFORD: As well as the fact that—

THE COURT: That's primarily what it's addressing, isn't it?

MS. CLIFFORD: It primarily addresses the Count Two criteria, although it does address Count One very explicitly. The [23] parties have commented on the question of enrichment restriction.

THE COURT: Isn't this a question that really needs to be settled one way or the other and isn't it one way to get it settled to precipitate some action by somebody, the agency or Congress or somebody, to go ahead and decide these motions and get them out of the way, at least then you have got a case on appeal and you have got some incentive for the agency and for Congress to make I'm their minds and take some action.

MS. CLIFFORD: Your Honor—

THE COURT: I don't care if I'm held to to be right or wrong, I'm going to call it the way I think is right. But it seems to me there would be much more incentive to get both the agency and Congress off the dime if we acted and went ahead and decided these motions.

MS. CLIFFORD: The agency is acting, as I indicated, we are acting promptly in this rulemaking. The matter is now before them, they have every intention—

THE COURT: When will there be a rule?

MS. CLIFFORD: The information available to me is that the agency is making every effort to have a rule out within the next month or so but, of course, it must then, according to the statutes, lie before Congress and I submit Your Honor that that is a very important consideration because Congress then would have the opportunity, if it feels that the agency has not acted in compliance with its intent under that provision, it would then [24] have the opportunity to legislate and we submit that that is the proper forum for consideration of any kind of restriction of this magnitude.

THE COURT: Well, this particular practice of seemingly unrestricted enrichment of foreign uranium is not, it seems to me, it's so contrary to the clear language of the statute. I don't see how rulemaking is going to cure it. How is that affected by any criteria that could be adopted?

MS. CLIFFORD: Your Honor, the restrictions must be in the form of criteria. This provision, provision 2201(v), provides that any restrictions that the Department does impose, and if, in fact, this Court were to find that the Department must consider restrictions, the proper vehicle for that would be a rulemaking. There would have to be notice and comment and again there would have to be an opportunity for Congress to consider the final criteria, that acknowledges the statutory scheme, and it is for that

reason that—that is one of the reasons why an injunction which would require the Department immediately to not accept foreign source uranium for enrichment would create an incredible problem for the numbers of utilities that now are under contract.

THE COURT: At the reason for that is, because, as you say, the historical facts have intervened and have changed the underlining situation on which the original statute was based, thus making the statute obsolescent, is that the basic legal argument?

[25] MS. CLIFFORD: No, Your Honor, I don't think—I'm not saying that the statute is obsolete, I'm saying, however, that one of the considerations that was not a consideration in 1964 is that there are others out there that are enriching uranium and they are enriching uranium at costs less than the Department of Energy can—is charging for it because the Department is required, under statute, to recover its costs.

THE COURT: And because that's going on I don't need to do what the statute says?

MS. CLIFFORD: No, Your Honor.

THE COURT: See, the thing that bothers me is that these are all very valid arguments and should be addressed to the Congress because they basically bear on whether the statute ought to be amended but they don't bear on whether I have got a duty to follow the statute as Congress has written it.

MS. CLIFFORD: Your Honor, they will be addressed to Congress when the rulemaking lies in front of Congress. Congress will have an opportunity to review those reasons which are set forth in the preliminary rule, the Department of Energy has identified those reasons as rational for not imposing restrictions. And, in fact, Congress has considered this before, there have been bills before Congress, as we noted in our brief, in 1982, and when Section 170(b)

of the Atomic Energy Act was passed, there were several bills before Congress at that time.

THE COURT: Did they address this issue?

[81] MS. CLIFFORD: Pardon me, Your Honor?

THE COURT: Did those bills address this issue?

MS. CLIFFORD: They addressed the issue of whether or not there should be mandatory strikes.

THE COURT: Did they pass?

MS. CLIFFORD: And they did not pass, Your Honor.

And we submit that again in looking at the statute the Court is charged with not just looking at the plain language of the statute, but also looking at other factors such as legislative history.

THE COURT: That particular history would tend to indicate that Congress is less likely to reject the present statute, doesn't it?

MS. CLIFFORD: Perhaps, Your Honor, that would indicate then that Congress agrees with the section interpretation of the statute, that if it cannot assure the viability of the domestic uranium industry, that there is no requirement that they try by placing controls on, that would only harm others and not perhaps benefit the domestic industry. We submit, Your Honor, that, and again we cited the case of Red Lion Broadcasting in our papers, which indicate that it's relevant in considering legislative history as to whether or not Congress has had before it other statutes that basically comport with a agency's interpretation of the statute, and in this case that is so, and Congress is aware of the Department of Energyi's position and has not acted. And we [27] submit that that's an indication that our interpretation of the statute is correct.

THE COURT: Or it might be a indication Congress has not had time to get to the job.

MS. CLIFFORD: Your Honor, I can't—

THE COURT: Maybe in our system of priorities this isn't as high as it ought to be. I hope you understand my

concern here because I don't feel that the policy arguments really are arguments that I can take into account.

MS. CLIFFORD: I submit they are not policy arguments but certainly it is relevant to the Court to examine the interpretation of the statute given to it by the party charged with interpreting it in the first instance and that also the Secretary in this case, and determining whether it's reasonable or logical.

THE COURT: That all goes to the injunction aspect, certainly because it's a matter in equity.

MS. CLIFFORD: Not just to the equities, Your Honor, which we submit are all on the defendants' side, with no indication that an injunction would do anything to benefit the plaintiffs, or certainly not when weighed against the harm to all other parties. But we submit, Your Honor, it goes to the interpretation as well, that the Court should look at the Department's interpretation of the statute and should look at the legislative history and what Congress has done, or chosen not to [28] do, since 1964, when this particular provision was enacted.

THE COURT: If the Court were to grant declaratory relief without an injunction, do you think that might get any more action so that this matter can get resolved whether it ought to be resolved, by the Congress?

MS. CLIFFORD: Your Honor, I don't believe that that would result in resolution necessarily by Congress, since—

THE COURT: Do you think it might get some rules out?

MS. CLIFFORD: Your Honor, the rulemaking has—is out. It is not clear whether or not the agency will change its mind from the proposed to the final rule, it is considering the comments, I submit that the agency is acting consistent with the statute at this point.

That's all I have, Your Honor, on that point.

THE COURT: Very well.

Thank you very much.

Anything further on that matter?

MR. NICKLES: Your Honor, with respect to the rulemaking, counsel has failed to tell the Court that the Department has announced in that rulemaking that it is proceeding on the legal foundation that it has discretion under 161(v), so we go back in the circle, and when the Department, about a month, ago issued notice that it was going to extend the period of comment for an additional 30 days on one matter, they reaffirmed their position under 161(v), that there should be absolutely no restrictions on [29] foreign source uranium enrichment. So it's not as if the rulemaking is going to obviate the problem because the Department is proceeding on the mistaken legal basis that this Court needs promptly to correct.

Secondly, Your Honor, the Comptroller General and the pertinent chairmen of the two committees in the House and the Senate have already expressed themselves on the record, that the Department of Energy cannot achieve by rulemaking what they are seeking to do, and that is to change the statutory mandate. So there is an urgent need for the Court to act.

And, finally, Your Honor, this is a curious argument that the utilities raise. The utilities say we have bought all this foreign source uranium and led the domestic industry to its demise. And if the Court should enforce the statute we may be required to do something. And that, I speculate, may increase their costs, or may have some effect ultimately, Your Honor, on the DOE's enrichment enterprise. What the DOE is saying to the Court, "We are a high-cost operator, and we may lose some business because those utilities that have foreign source uranium may have that uranium enriched abroad." They will not impact adversely, the DOE enrichment enterprise that's impacted adversely, and that's what the heart of this matter, the industry is being sacrificed because this government enterprise has found itself to be a high-cost operator cannot compete with foreign enterprises.

So I respectfully and urgently request the Court, as [30] quickly as the Court feels it can, to grant our relief in full and impose an immediate ban. The Department will simply not change its view until and unless the Court requires that it do so. And these excuses, these rulemakings, these appeals, these complaints, are simply attempts to avoid what the Court, I'm sure, has seen to be the clear language of the statute. We have tried our best, Your Honor, to deal with this matter, through all avenues and we cannot—we stand before the Court today and say to the Court, "We need help immediately on this statute."

Thank your.

THE COURT: We will take a very short recess and then we will take Count Two.

MR. SHAVER: Thank your, Your Honor.

MR. NICKLES: Thank you, Your Honor.

[Whereupon at the hour of 2:19 o'clock p.m. the Court stood in recess and reconvened at the hour of 2:31 o'clock p.m.].

THE COURT: I would prefer to write an opinion on this matter, so that I could take time and meticulously set out the reasoning, but because the Justice Department has now delayed for almost two years the filling of two vacancies on this court, it's impossible for me to write opinions any more, and I haven't written any substantial opinions for many, many, many months. Therefore, I will simply state my rulings orally, and I'll order that plaintiff prepare and defendants approve as to form the [31] proposed order that will summarize the rulings to be submitted to the Court no later than 12:00 noon tomorrow.

As to the assertions in the motion directed to Count One, the defendants' motion for a stay of proceedings as to the Count One matter is denied.

As to the substance of the matter, the plaintiffs' summary judgment motion as to Count One is granted.

The defendants' cross motion for summary judgment as to Count One is denied.

Are there other pending motions as to Count One?

[No response].

THE COURT: Does that now take care of all of them?

I'm holding that the Department of Energy is subject to judicial review under the Administrative Procedure Act.

I'm further holding that a failure to act is an action by an agency, and I think that's clearly provided in 5. U.S. Code, Section 551 Sub 13. It's a closer issue when the Department of Energy's action or failure to act in this matter may be somehow within some form of discretion, but it appears to me that the Congressional mandate of 42 U.S. Code, Section 2201(v) is clear, and does not really leave any room for any discretion nor does the Atomic Energy, in my view, preclude judicial review here. The Block case, which has been cited, the Milk case, in my view, is clearly distinguishable and in that case the Act, itself, had created a class of litigants who did have the authority to proceed [32] and litigate in the matters. And, therefore, there wasn't any standing of the ultimate consumer of the milk to litigate. That's not saying that is the situation in this case. The general rule is that there is judicial review under the Administrative Procedure Act is nothing in this act to indicate that Congress intended any exception. When I talk to Block, I mean Block vs. Community Nutrition Institute in 104 Supreme Court, 2450, 1984 opinion by—I believe it was Justice O'Connor, Adminstrative Procedures Act infers a general caution upon persons affected or aggrieved by agency action, that's found in 5 U.S. Code

Section 702. And in the Block case, the Court simply held that consumer of milk products were precluded from seeking judicial review of milk market orders. But the Court there relied on language of the statute, itself, and its structure and its objectives, its complexity, and its legislative history. But the primary support for the conclusion came from the fact that the statute, itself, provided a complex administrative scheme for review of milk market orders and put the authority to pursue that review in the persons most likely to be aggrieved and for whose benefit the statute was passed, namely, the milk producers and not in the consumers.

There is no such action by Congress in this particular statute. Now, in this case, Congress, having stated that the suit may not be brought against individuals, except as authorized and brought by the Attorney General, it's the position of the plaintiffs here, and I think correctly, that this action is not [33] against individuals but against the agency in the way that an action against the agency can be brought. Here the only alternative would be a cite by the Attorney General or some other member of the executive branch, it seems to me that it's unlikely that there is going to be any relief provided anybody from that source. It leaves no way for any aggrieved party to bring a lawsuit.

In any event, I conclude that the Atomic Energy Act does not preclude judicial review of that agency's actions or that present Department of Energy's actions. It appears to me that even if there were some discretion given to the agency here to determine whether or what measures ought to be taken, clearly this statute does not leave the discretion not to take any measures at all to assure the provision of a viable domestic industry. It seems to me clear from the Congressional history that Congress intended that--that its language operate as a mandate, and if it didn't so intend then it ought to be swiftly amended so that

courts can understand that it didn't intend what its plain language says.

Let's go on to Count Three, I believe we are on. Which would—I guess I have already disposed of the Count Two issues.

MS. CLIFFORD: Your Honor, if I may, for purposes of clarification, does Your Honor—I'm asking if Your Honor would specify—

THE COURT: I'm inclined to grant the injunction but I [34] would like the parties to meet before the order, proposed order, is submitted. I'm trying to get through this fast enough so you can do that today. I don't like these things to sit around. I have got 500 cases of about this magnitude, I don't know how many you have got, but I have about 500 of them. And I can't keep them all in my head at once so I try to move them in and out as fast as I can and do the best job I can, and forget about them, and let the Court of Appeals worry about them after that.

I would urge the parties to meet and try to devise an injunction that would be workable to both. If I have to impose one I will simply do it in the best terms I can. But, generally speaking, parties know much more about their situation than a court can know in the little time we have available to review these complex matters. The parties also can settle their claims much better than they can usually be settled by decision by a court, and when you are unhappy with court decisions I hope you will take that into account. This matter could have been settled, still can be.

So by noon tomorrow I would like to receive a proposed order, including a proposed injunction, and it it's rational and reasonable I will probably sign it; if it's not, I won't.

Then let's move to Count Three, if you will, Counsel.

This is the plaintiffs'—plaintiff has a cross motion for summary judgment on Count Three, I believe, is that right?

MR. SHAVER: That's correct, Your Honor.

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In the Supreme Court of the United States

No. 87-645

CLARK F. HUFFMAN, ET AL., PETITIONERS

v.

WESTERN NUCLEAR, INC., ET AL.

ORDER ALLOWING CERTIORARI. Filed January 11, 1988.

The petition herein for a writ of certiorari to the *United States Court of Appeals for the Tenth Circuit* is granted.

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